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Introduction

The Search For Policies On Protecting The Opportunity Of An Individual To Earn A Livelihood Through Performance Of Personal Services

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This issue of the NEBRASKA LAW REVIEW contains an authoritative and varied series of articles dealing with a fundamental policy theme—the extent to which the law should accord protections to individual personal employment relationships. The theme of the issue is drawn from the same general social composition in which themes for protection of property ownership, enforceability of contracts generally, and other business-related legal rights are orchestrated.

The Symposium chronicles the dynamic and unprecedented changes which have occurred during the last quarter century with respect to the law governing the individual employment relationship. It also defines the parameters within which important decision making will take place during the next quarter century and offers many recommendations on what those choices should be.

The dynamic and unprecedented changes during the last quarter century have been produced by major federal legislation dealing with the acquisition, retention, and termination of employment, the dramatic elevation of constitutional rights of public employees evidenced in the decisions of the United States Supreme Court, and the flood of state court decisions which completely overhaul the former employment-at-will rules. In contrast, state legislatures have taken a less active role in the last twenty-five years in developing new individual employment law policy than they had in the previous seventy-five years.

The initial refrain was the Civil Rights Act of 1964, which presented rules prohibiting discrimination on the basis of race, color,

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religion, sex, and national origin. The Act reflected a public concern and stimulated a further awareness and respect for the importance of employment decisions made on the basis of work-relevant criteria. As this Symposium is being printed, Congress is actively considering several major provisions affecting individual employment relationships. Notification of plant closings, limitations on the use of polygraphs in employment matters, parental leave, high risk occupational notification and regulation, and limitations on double breasting practices are all at significant stages of Congressional deliberation.

Decisions of the United States Supreme Court since the late 1960's have interpreted and applied the first and fourteenth amendments in a manner that has established a whole new law of public employment in addition to the protections previously advanced by civil service, merit system, tenure, and similar protective systems. The direct application of these constitutional decisions on private employment issues has been slight in comparison to the impact on public employment law, but the carryover by analogy to determinations affecting private employment has been very significant. The constitutional rules on public employee free speech and procedural due process, for example, have tended to become a standard of measurement for legislatures, state courts in termination of employments-at-will cases, and labor arbitrators in the private sector.

The single most dynamic and unprecedented change affecting individual employment law has arisen from the state courts, which are contemporaneously altering the former rules on employment at will. These alterations reflect an overwhelming change, not only in the rules themselves, but also in the state court philosophy from one of passive adherence to the applications of legislation and precedents, to an active participation in new legislative policy making with respect to the individual employment relationship.

Although the state courts may appear to be legislating in the employment law field, there is no reason why state courts in traditional common law areas should not make new and major public policy determinations. After all, many or most of the rules of property, contract, and business with which the individual is pitted in private employment matters were developed initially and primarily by judicial decision. The same sorts of policy determinations which induced the development of common law rules of property, contract, and business certainly warrant further judicial policy making as individual personal service relationships have acquired greater economic and social significance.

For many years, however, state courts did not generally make new policy determinations affecting individual employment relationships—at least, policy determinations in support of the employment and in limitation of the previous judicially established property, con-

tract, and business rules. For so many courts to have acted so contemporaneously in the last fifteen or twenty years is the most dynamic and unprecedented aspect of the story.

This NEBRASKA LAW REVIEW Symposium presents scholarly analyses that are important and applicable to developing Nebraska employment law. Despite a general agricultural economic background, Nebraska shares an interest in the individual employment legal issues which are being considered throughout the country. Nebraska legislative and judicial decision policy making on the subject of individual employment rights is still in a muddle. Like most state legislatures, the Nebraska Legislature has not yet dealt directly with the employment-at-will rules. The Nebraska Supreme Court has strongly stated that there are public policy and implied contract exceptions, but it has been extremely difficult for claimants to achieve success to date. It is also difficult to predict the course of the development of Nebraska law over the next few years. So far, the Nebraska Legislature and courts have dealt with the issues on an *ad hoc* basis.

The Nebraska Legislature has a long history of responsiveness to public and private employment issues. At the turn of the century, there was paid firefighter pension legislation, in 1909, a criminal statute against coercing an employee "in his voting or any other political action," an early and liberal workers' compensation statute in 1913, and a provision added by the Nebraska Constitutional Convention of 1920 allowing the legislature to enact laws "providing for the investigation, submission, and determination of controversies between employers and employees in any business or vocation affected with a public interest" and allowing the establishment of an Industrial Commission to administer the laws. Subsequently, merit system and civil service laws for public employees were enacted, public utility employee wage setting was provided in 1947, a "meet and confer" law for public school teachers was adopted in 1967 followed by a general public employee bargaining law with a judicial-type wage setting impasse procedure in 1969. The Nebraska Legislature also has enacted state equal opportunity laws, minimum wage, job training, and other broadly applicable statutes in recent years.

Despite this impressive legislative record on public and private employment issues generally, the Nebraska Legislature has not yet made significant policy determinations directly on the employment-at-will status. Violations of criminal statutes fall judicially within the public policy exception even if no civil cause of action is contained in the criminal enactment. But the development of employment-at-will rules, themselves, still remains with the judiciary.

LB 582, enacted by the 1988 Nebraska Legislature, spells out statutory criteria for tests performed on the body fluid or breath specimen of employees which may be used for disciplinary or administrative ac-

tion by an employer.[1] However, it expressly avoids the critical issue of when the tests can be given. Separate sections provide that: (1) "Nothing in this act . . . shall be determinative of the cases or circumstances under which such tests may be given;"[2] (2) "Nothing . . . shall be construed to establish any rule, right, or duty not expressly provided for in such sections;"[3] and (3) "Any employee who refuses the lawful directive of an employer to provide a body fluid or breath sample as provided in . . . this act may be subject to disciplinary or administrative action by the employer, including denial of continued employment."[4]

The Nebraska Supreme Court did not sustain a claim under the public policy exception until late 1987 in *Ambroz v. Cornhusker Square Ltd.*[5] Even then, the opinion did not make clear whether the cause of action was properly a tort action for wrongful discharge as the employee characterized the theory of the case or a breach of contract claim as much of the language in this and other Nebraska opinions suggests.

It is clear that Nebraska has declined to recognize a general implied covenant of good faith dealing in employment termination.[6] It is not clear whether the basis for a public policy exception requires "contractual or statutory restriction upon the right of discharge," a deprivation of "constitutional or statutory rights," or "exceptions created by statute or those instances where a very clear mandate of public policy has been violated." Each expression is contained in the *Ambroz* opinion.

The *Ambroz* ruling was seven years in gestation. In a 1980 decision, after finding that "it is obvious that adequate cause existed" for the employment termination, the court in a clear dictum discussed the developing law of other jurisdictions in which "an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy."[7] Later decisions, including a mid-1987 opinion,[8] made clear that while a number of Nebraska Supreme Court decisions had considered this body of law, Nebraska had not yet adopted the public policy exception.

In 1988, the Nebraska Supreme Court held that the public policy exception applied to an employee who reported to public authorities

1. L.B. 582, 90th Leg., 2nd Sess., 1988 Neb. Laws 518 (to be codified at NEB. REV. STAT. §§ 48-1901 to 48-1910).
2. *Id.* § 1 (to be codified at NEB. REV. STAT. § 48-1901).
3. *Id.* § 7 (to be codified at NEB. REV. STAT. § 48-1907).
4. *Id.* § 10 (to be codified at NEB. REV. STAT. § 48-1910).
5. 226 Neb. 899, 416 N.W.2d 510 (1987).
6. *Id.* at 902-03, 416 N.W.2d at 513 (quoting Jeffers v. Bishop Clarkson Memorial Hosp., 222 Neb. 829, 833, 387 N.W.2d 692, 695 (1986)).
7. Mau v. Omaha Nat'l Bank, 207 Neb. 308, 316, 299 N.W.2d 147, 151 (1980).
8. Johnston v. Panhandle Coop. Ass'n, 225 Neb. 732, 743, 408 N.W.2d 261, 269 (1987).

that his employer had been engaged in odometer fraud.[9] No prosecution was brought against the employer under the criminal statute and the employer discharged the employee. The employee's claim, however, was unsuccessful. The court, in a five to two decision, affirmed the employer's summary judgment, and held that the employee's evidence did not show that he had reasonable cause to believe the employer "had violated the odometer fraud statutes or that he acted in good faith in reporting such a suspected criminal act by his employer."[10]

Both the Nebraska Supreme Court and litigants are having an exceedingly difficult time identifying what constitutes an individual employment contract. Although a portion of the initial 1980 decision suggests that "a handbook issued after an employee is hired cannot become part of that employee's contract," this statement was expressly overruled in 1987. Even if the handbook is a part of an employee's contract, the court has held that such handbooks do not secure employment for a definite term.[11] A 1983 decision was soundly criticized by a civil procedure professor[12] for its failure to remand the case for a new trial after "she successfully blazed the first trail" of an employee handbook case. The court held that the employee stated a cause of action based upon the employer's failure to follow the appellate procedures in the grievance process contained in its published "Policy and Procedures." Nevertheless, the court affirmed a demurrer sustained in favor of the employer because the employee did not specifically plead that the grievance committee's findings in the initial determination did "not conflict with established hospital policy or applicable laws and regulations" under the grievance procedure criteria.[13] The most recent 1988 decision, after terming the employee's pleadings "admittedly difficult to decipher" and "unartfully drafted," held that the question whether the employer's oral representations constituted an implied contract that the "employment would not be terminated except for just cause presented a question of fact for the jury."[14]

Throughout the next quarter century, courts and legislatures will more clearly define what alterations are needed in the old employment-at-will rules. This Symposium discusses the parameters for this decision making and the extent to which the law should accord protections to individual personal employment relationships. Any alteration

9. Schriner v. Meginnis Ford Co., 228 Neb. 85, 421 N.W.2d 755 (1988).
10. *Id.* at 92, 408 N.W.2d at 755.
11. Johnston v. Panhandle Coop. Ass'n, 225 Neb. 732, 408 N.W.2d 261 (1987).
12. Lenich, *It's Time to Pack Away the Crystal Ball: The Need for Remand in Pleading and Proof Cases of First Impression in Nebraska*, 66 NEB. L. REV. 320, 348-54 (1987).
13. Morris v. Lutheran Medical Center, 215 Neb. 677, 340 N.W.2d 388 (1983).
14. Hebrad v. American Tel. & Tel. Co., 228 Neb. 15, 17, 421 N.W.2d 10, 12 (1988).

in the law of employment-at-will requires an articulate balancing of the new individual employment contract rights with existing property, contract, and business rights and the costs associated with changing the existing rights.

Of special importance will be coordinating the new individual employment contract rights with other individual employment rights, such as the antidiscrimination laws. This will require not only substantive coordination of the rules but also major attention to the procedural aspects of identifying an appropriate forum, choice of applicable law or laws, the effects of limitations on actions, and issue preclusion or finality of determinations under each of the systems.

This Symposium appears to reflect an increasing sentiment for legislative enactment of laws dealing expressly with individual employment terminations. Judicial policy making of this sort is very difficult, time consuming, expensive, and erratic. The Nebraska Supreme Court decisions from 1980 to 1988 clearly show the perplexities in one state. The articles in the Symposium demonstrate the inherent restraints in judicial reformation of the principles applicable to individual employment contracts in many other states despite very competent professional judicial judgment and responsibility. Courts will continue to have substantial litigation of employment terminations, but the adversary determinations arising from these discharges might better be handled as court decisions pursuant to statutory standards and procedures or, perhaps, still better by an arbitrator or other alternative dispute resolution mechanism.

It is also foreseeable that there will be continued interest in the subject at both the state and federal levels of legislative policy making. Apart from the ever present issues of federal preemption and "states' rights" in general terms, serious coordinated attention should be given to defining the appropriate location for individual employment contract rules. If this is not done, there is a serious risk of overkill in addition to the added complexities of a double set of rules adopted to achieve the same objective.

The members of the student Editorial Board of the NEBRASKA LAW REVIEW, as well as the distinguished authors of the lead articles in the Symposium, deserve major recognition for developing the substantial professional research and analytical insights contained in this issue. In particular, the work of Cheryl R. Zwart, Symposium Editor, was outstanding.